



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-19

FACTS:

You are the Administrative Assistant (Assistant) to the Board of Selectmen (Board) of a town (Town). The Assistant is appointed on an annual basis to this full-time, paid position. The Assistant's duties have recently been expanded to include the responsibilities of the insurance commissioner (Commissioner), previously a separately appointed, paid part-time position. Additionally, the Assistant's duties now include the responsibilities of Secretary to the Sewer Commissioners (Secretary), previously also a separately appointed, paid part-time position. The Assistant will now be compensated through one paycheck for all of her services in that position. The Assistant is now interested in seeking election to a position on the Board.

You also inform us that the Assistant is married to the manager of a Town department, full-time position appointed by the Board.

QUESTIONS:

1. Does G.L. c. 268A permit the Assistant to provide services to multiple municipal agencies, assuming that she will receive only one paycheck?
2. Does G.L. c. 268A permit the Assistant to hold her current Town position and to serve as a Selectman?
3. If she is elected and serves in the position of Selectmen, is Town Meeting approval required under G.L. c. 268A, §21A in order for the Assistant to be reappointed in future years to her current position as Assistant?

ANSWERS:

1. Yes.
2. Yes, provided that she complies with the exemption found in §20(d).
3. Yes.

DISCUSSION:

The Assistant is a municipal employee^{1/} for purposes of G.L. c. 268A. Selectmen are also considered municipal employees.

1. The Assistant's Current Position.

Section 20

Section 20 prohibits a municipal employee from having a financial interest in a municipal contract. For purposes of the conflict of interest law, the term "contract" includes any type of arrangement between two or more parties, under which each undertakes certain obligations in consideration of the promises made by the other. Thus, the Commission has previously held that the term "contract" includes employment arrangements.

See EC-COI-84-91; In Re Doherty (1982). *See also Quinn v. State Ethics Commission*, 401 Mass. 210 (1987).

Typically, when an individual receives compensation from the same municipality for more than one appointed municipal position, an issue is raised under §20 by virtue of the separate employment contract which results from each municipal appointment. Here, however, you tell us that the duties of the Assistant have recently been expanded to include the responsibilities of Commissioner and Secretary, and that the Assistant will be compensated with only one check. In *EC-COI-83-83*, the Commission concluded that a state employee who received one paycheck which reflected duties performed for two state agencies would not violate §7 (the state counterpart to §20) because the duties performed would be considered to stem from one state employment contract. *See also EC-COI-84-12*. Similarly, we conclude here that, because the functions of Assistant, Commissioner and Secretary have been combined into one municipal position, an issue under §20 will not arise.

2. Holding the Positions of Selectman and Assistant.

We must also examine §20 in light of the Assistant's intention to seek the office of Selectman. A selectman who also serves as the selectmen's Assistant will have a financial interest, within the meaning of §20, by virtue of the "employment contract" which results from her appointment to the compensated Assistant's position. Such a financial interest in a municipal contract is prohibited unless one of the exemptions found in §20 applies.

Because the Town has fewer than 10,000 residents, the Town's Selectmen are, by definition, special municipal employees.^{2/} As a special municipal employee, the individual in question may avail herself of the exemption found in §20(d)^{3/} to overcome the prohibition against the financial interest she has in her employment contract as Assistant.^{4/} She must file, with the Town Clerk, a written disclosure of her financial interest in the Assistant's position, and must also receive, from the remaining selectmen, approval of the §20(d) exemption.^{5/}

We note that §20 also contains an exemption (the "selectman's exemption") which permits a municipal employee to hold the additional municipal position of selectman, provided that the individual is employed by the municipality prior to becoming a selectman. The selectman's exemption imposes several additional restrictions. For example, the municipal employee may receive only one municipal salary but has the ability to choose which salary he will receive. In addition, as a selectman, he may not vote or act on any matter within the purview of the municipal agency by which he is employed or over which he has official responsibility. Finally, he may not be appointed to any additional municipal position while serving as a selectman or for six months thereafter. While the Assistant is not prohibited from using the Selectman's exemption, rather than §20(d), to overcome the §20 prohibition, use of the Selectman's exemption will render her service as a Selectman of little or no value to the Town because of the restriction that, as a Selectman, the Assistant may not vote or act on any matter within the purview of the municipal agency by which she is employed. *See EC-COI-93-4*. Because the Assistant is employed by the Board, the restriction imposed by the selectman's exemption would prohibit her from acting or voting on any of the Board's business. Thus, we assume that the Assistant will elect to pursue an exemption under §20(d). The Assistant must additionally comply with the standard imposed by §19 of G.L. c. 268A.

Sections 19

Section 19 prohibits a municipal employee from participating^{6/} in any particular matter^{7/} in which she or her immediate family members,^{8/} including her husband, has a financial interest.

Section 19 will prohibit the Assistant as selectman from participating in matters related to her employment or any reappointment as Assistant. For example, the Assistant could not participate as a selectman in the approval of the §20(d) exemption for herself. Moreover, she cannot participate as Assistant or as selectman in any particular matter which will have a financial impact on her husband's employment by the Town. We note that participation includes not only the final, formal vote on a given matter, but also any discussion, recommendations, etc., leading to a formal vote. *EC-COI-87-25*. Whenever such a matter comes before the Board, it would be advisable for her to leave the room. *See Graham v. McGrail*, 370 Mass. 133, 138 (1976).

3. The Assistant's Reappointment.

Assuming that the Assistant receives a §20(d) exemption permitting her to hold the positions of selectman and Assistant, the next issue is whether the Assistant/selectman may be reappointed by the remaining selectmen to the Assistant's position on an annual basis.

Section 21A

Section 21A prohibits a municipal board or commission from appointing any of its members to any office or position under the supervision of that board or commission unless such appointment is first approved by a vote at an annual town meeting or unless the member has resigned from the Board at least thirty days before the appointment. Therefore, even upon compliance with the requirements of §20, an issue will arise under §21A if the board of selectmen appoints one of its current members (or a former member prior to the expiration of thirty days) to a position under the supervision of the selectmen.^{9/}

In *EC-COI-92-30*, we explained that §21A is rooted in the common law doctrine of incompatibility of offices. See *Gaw v. Ashley*, 195 Mass 173 (1907); *Attorney General v. Henry*, 262 Mass. 127, 132 (1928); *Mastrangelo v. Board of Health of Clinton*, 340 Mass. 491, 492 (1960); *Starr v. Board of Health of Clinton*, 356 Mass. 426 (1969). This incompatibility includes the potential danger that a board member will attempt to persuade his fellow colleagues to appoint him or otherwise engage in conduct which might give the appearance of such self-dealing activity, and the danger that, as a result of alliances formed through service together on a board, board members will be persuaded to reappoint one who, under different circumstances, they would conclude should be removed from office. See *Mastrangelo*, 340 Mass. at 492; See also *EC-COI-80-44* (§21A serves to prohibit board member from attempting to persuade fellow colleagues to appoint him or appearance of self-dealing activity). Our review of this body of common law, and the express language of §21A, persuades us that the Legislature has chosen to resolve the actual or perceived incompatibility of positions by prohibiting the **appointment** of an individual to a position under the supervision of his fellow board members. We must still consider, however, whether the policy considerations embodied in §21A are also implicated in the case of a reappointment.

We have previously examined the issue of reappointment in the context of §20 and the selectman's exemption. In *EC-COI-82-107*, we considered whether the selectman's exemption and its prohibition against appointment to a second municipal position effectively barred an individual's reappointment to a municipal position which he held prior to becoming a selectman. Noting the statute which created this appointment bar was entitled, "[a]n act providing that a person shall not be prohibited from holding the office of selectman in a town because such person is an employee of the Town," we concluded that the appointment bar was intended to cover only new, post-elective appointments. We went on to note that the reappointment at issue in *EC-COI-82-107* was not the same as an appointment to a new, post-elective position. Rather, we concluded that the reappointment was more properly regarded as an appointment to the very position which the selectman's exemption expressly permits a selectman to hold.^{10/}

We decline to reach a similar result, however, with regard to our treatment of reappointment in the context of §21A, because §21A serves a substantially different purpose. In contrast to the selectman's exemption, §21A prohibits a board member from acting to appoint a fellow board member to a position under the supervision of the board, absent a vote of the Town meeting. We find that by erecting this appointment bar the Legislature has once again sought to address the potential for abuse whereby selectmen could acquire or continue to hold a subordinate position by virtue of their incumbency in the office of selectmen. See *fn.9*, above. We conclude that the application of §21A to the Assistant is appropriate where the potential for using the office of selectman to seek designation by her fellow board members to continue to hold the Assistant's position is present upon her "reappointment".^{11/} Therefore, if the Assistant is serving as a selectman when her current appointment as the Board's Assistant expires, she may not be reappointed by the Board as Assistant, without first receiving approval of the appointment at the annual town meeting,^{12/} or if she has resigned from her Selectman's position, she may be reappointed only after the expiration of thirty days.

DATE AUTHORIZED: September 14, 1993

^{10/}"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal

agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

²“Special municipal employee”, a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

³Under §20(d), the restrictions of §20 do not apply to a special municipal employee who files with the clerk of the city, town or district a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if the city council or board of aldermen, if there is no city council, board of selectmen or the district prudential committee, approves the exemption of his interest.

⁴Section 20 also contains an exemption which is applicable to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency. This exemption is not available here because, as a selectman, the Assistant is employed by the contracting agency (the Board) and, therefore, she participates in the activities of the contracting agency. See G.L. c. 268A, §20(c).

⁵In her Assistant’s position, the employee will not have a financial interest in the position of selectman because selectmen are elected and we have previously determined that election to a public office does not create a contract. *EC-COI-82-26*.

⁶“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

⁷“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁸“Immediate family,” the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

⁹The §21A restriction, however, is not triggered until a board appoints one its own members to a position under that board’s supervision. Where a person is first employed under the supervision of a board and then becomes a board member, an issue will not be raised under §21A if no additional appointment is necessary. See *Commission Advisory No. 3*.

¹⁰As we noted in *EC-COI-82-107*, the Legislature was apparently aware of the potential for abuse in that a selectman could use that position to acquire other municipal positions. The Legislature, however, addressed that concern in the case of regular selectmen (i.e. selectman who are required to use the selectman’s exemption to continue to hold a municipal position held prior to becoming a selectman) by prohibiting those selectmen from seeking and holding any additional municipal positions (not held prior to election).

¹¹We do not believe our interpretation here of §21A is inconsistent with *EC-COI-82-107* because we believe that the selectman’s exemption does not contemplate allowing a municipal employee to seek and hold the additional position of selectman when the original municipal position is a position under the supervision of the selectmen. As we noted above, use of the selectman’s exemption where one holds a position under the supervision of the Board renders the selectman’s position a nullity. See our discussion at Section 2. To the extent that it is necessary, we are here clarifying our ruling in *EC-COI-82-107* to state that the selectman’s exemption will effectively allow reappointment only where such reappointment is to a position which is **not** under the supervision of the selectmen.

¹²We note that unless the Town restructures the Assistant’s position so as to obviate the need for annual reappointment, town meeting approval will be necessary each year in order for the Assistant to continue to hold that position as well as her selectman’s position.